



FH
[REDACTED]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

DECISION

MDV/173527

PRELIMINARY RECITALS

Pursuant to a petition filed April 07, 2016, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Kenosha County Human Service Department in regard to Medical Assistance (MA), a hearing was held on May 03, 2016, at Kenosha, Wisconsin.

The issue for determination is whether the agency correctly determined that payment to Petitioner's children for care was a divestment.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Petitioner's Representative:

[REDACTED]
[REDACTED]
[REDACTED]

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703

By: [REDACTED]

Kenosha County Human Service Department
8600 Sheridan Road
Kenosha, WI 53143

ADMINISTRATIVE LAW JUDGE:

David D. Fleming
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Kenosha County.
2. A Medicaid application was submitted to the agency on behalf of Petitioner on February 4, 2016. As part of the application process Petitioner's family submitted copies of checks paid to family members

in the amount of \$60,600.00. That application was denied as the agency determined that Petitioner had divested \$60,600.00.

3. Petitioner's son, [REDACTED], is her Power of Attorney (POA).
4. On June 20, 2012 [REDACTED], acting as POA, signed statements with 2 of his siblings and with himself individually agreeing to provide personal cares to Petitioner at a rate of \$19.00 per hour.
5. [REDACTED] established the \$19.00 per hour personal care rate to family members by contacting 2 local supportive home care organizations to determine their rates for care and determined that to be the median rate.
6. The economic support agency denied the application as it concluded that the \$60,600.00 in payments to Petitioner's children was a divestment. The divestment period was determined to be from February 4, 2016 through September 29, 2016 ($\$60,600.00 / \$252.95 = 239$ days).

DISCUSSION

A person seeking Medical Assistance is ineligible if his/her assets exceed \$2,000. *Wis. Stat. § 49.47(4)(b)3g*. In order to prevent those with enough funds to pay for their own medical care from becoming a burden to the general public by passing their assets to potential heirs, Medicaid law prevents a recipient from reaching this asset limit by divesting assets.

Further, in an administrative hearing, such as this, the petitioner has the burden of proof to establish that a denial action taken by the county, like the denial of Medicaid due to a divestment of assets was improper given the facts of the case. *See, 20 C.F.R. §§416.200-416.202; see also, 42 C.F.R. §435.721(d)*. While oral testimony concerning the intent of the applicant is important, great weight must be afforded by the actions taken by the applicant given the overall circumstance at the time. Thus the explanation as to the transfer of assets must be well documented and evident in light of all of the facts.

When an individual, the individual's spouse, or a person acting on behalf of the individual or his spouse transfers assets at less than fair market value, the individual is ineligible for Institutional MA, which provides coverage of nursing facility services. *42 U.S.C. 1396p(c)(1)(A); Wis. Stat. §49.453(2)(a); Wis. Adm. Code §DHS 103.065(4)(a); Medicaid Eligibility Handbook (MEH), §17.2.1*. Very generally, the 'lookback' period from the date of application or entry into a nursing home is 60 months. *Wis. Stat. § 49.453(1)(f)2m*. Divestment does not impact on eligibility for standard medical services such as physician care, medications, and medical equipment (these are called "MA card services").

At one time, the penalty period was calculated as the number of months determined by dividing the value of property divested by the average monthly cost of nursing facility services. The Federal Deficit Reduction Act of 2005 (DRA) requires the imposition of partial months of ineligibility for divestments. For all divestments that occur on or after January 1, 2009, the penalty periods are to be calculated as the number of days for which Medicaid will not pay for long term care services. Penalty periods are no longer rounded down to whole months. In order to impose partial months of ineligibility, as required by the DRA, all divestment penalties will be calculated in days, using the average daily nursing home cost to a private pay patient. *MEH, § 17.5.1*. This is currently \$252.95. *Id., §17.5.2*.

Of particular relevance here are the following provisions from the MEH:

17.8.1 Introduction

Divestment is when an institutionalized person transfers resources to a relative in payment for care or services the relative provided to him or her. A relative is anyone related to the institutionalized person by blood, marriage, or adoption.

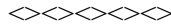
Count all the payments for care and services that the institutionalized person made to the relative in the last 60 months. Payment can include cash, property, or anything of value transferred to the relative. It is not divestment if all of the following conditions exist:

- The services directly benefited the institutionalized person.
- The payment did not exceed reasonable compensation for the services provided. "Reasonable compensation" is the prevailing local market rate for the service at the time the service is provided.
- If the amount of total payment exceeds 10 percent of the community spouse asset share (see Section 18.4.3 Calculate the Community Spouse Asset Share), the institutionalized person must have a written, notarized agreement with the relative. The agreement must:

◦Specify the service and the amount to be paid

◦Exist at the time the service is provided.

MEH, §17.8.1.



17.4 Exceptions

A divestment that occurred in the look-back period or any time after does not affect eligibility if any of the following exceptions apply:

1. The person who divested shows that the divestment was not made with the intent of receiving Medicaid.

The person must present evidence that shows the specific purpose and reason for making the transfer, and establish that the resource was transferred for a purpose other than to qualify for Medicaid. Verbal assurances that he or she was not trying to become financially eligible for Medicaid are not sufficient. Take into consideration statements from physicians, insurance agents, insurance documents, and bank records that confirm the person's statements.

...

MEH, §17.4.

The maximum community spouse asset share is \$119,220. MEH, §18.4.3. As the amount involved here is in excess of 10% of \$119,220.00, the notarized statement is required.

Petitioner's representatives argue that all of the conditions spelled out in the MEH as noted above have been met except for the notarized statement, and given the signed statements as to Petitioner's care as well as the schedules they have provided concerning her care, this demonstrates that the exception provision of MEH, §17.4 should apply.

I am rejecting Petitioner's argument and finding a divestment for two reasons. First, the specific language of §17.8.1 is that a notarized statement is required. To apply the exception provision where there is such a specific requirement is to render the specific policy meaningless and permit local agencies and/or the Division of Hearings and Appeals to exercise equitable authority not delegated to the local agency or the Division of Hearings and Appeals. *See, e.g., Wisconsin Socialist Workers 1976 Campaign Committee v. McCann*, 433 F.Supp. 540, 545 (E.D. Wis.1977). The Division of Hearings and Appeals must limit its review to the law as set forth in statutes, federal regulations, administrative code provisions and department policy pronouncements not in conflict with those authorities. Accordingly, the Division of Hearings and Appeals does not have authority under law to perform "equity" in the manner sought.

Second, I do not find the payment of rate of \$19.00 to be reasonable. That is the rate the supportive home care agencies charge. It would include their costs and profit margin. It is not the rate paid to the individual caregiver.

I am sustaining the agency determination that a divestment occurred.

CONCLUSIONS OF LAW

That the agency correctly concluded that a \$60,600.00 divestment occurred as alleged.

THEREFORE, it is **ORDERED**

That this appeal is dismissed.

REQUEST FOR A REHEARING

You may request a rehearing if you think this decision is based on a serious mistake in the facts or the law or if you have found new evidence that would change the decision. Your request must be **received within 20 days after the date of this decision**. Late requests cannot be granted.

Send your request for rehearing in writing to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400 **and** to those identified in this decision as "PARTIES IN INTEREST." Your rehearing request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and explain why you did not have it at your first hearing. If your request does not explain these things, it will be denied.

The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or at your local library or courthouse.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, Wisconsin 53703, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Milwaukee,
Wisconsin, this 24th day of June, 2016

\sDavid D. Fleming
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on June 24, 2016.

Kenosha County Human Service Department
Division of Health Care Access and Accountability
[REDACTED]